IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JAMES WHITTED	:	NO. 05-598-02
ARNOLD MONTGOMERY	:	NO. 05-598-08
GEORGE ANDERSON	:	NO. 05-598-09
LAMAR MCGURN	:	NO. 05-598-12

MEMORANDUM

Baylson, J. **November 13, 2006**

This is a multi-defendant case charging conspiracy to distribute cocaine and related crimes, including firearm charges. Thirteen Defendants were included in the original indictment, but this Memorandum only concerns the four Defendants named above, as to whom the trial is scheduled to commence on November 27, 2006.

The Court has held a series of pretrial conferences and arguments in this case. On July 21, 2006, the Court entered a seventeen-page Memorandum and Order, ruling on a number of pretrial motions. Since that time, additional motions have been filed which shall be discussed in this Memorandum and ruled on in the accompanying Order.

I. Motion by James Whitted to Disqualify the Eastern District of Pennsylvania United States Attorney's Office from Further Participation in Case Due to Ethical Breaches (Doc. No. 274)

The Court held a hearing on this Motion on October 5, 2006. The government responded on October 4, 2006 (Doc. No. 287).

The basis of the motion concerns events which took place before the grand jury where the Defendant Whitted asserts that the prosecutor, Salvatore Astolfi, who presented the case to the

grand jury, and is also trial counsel for the government, questioned FBI agent Luke Church about prior convictions of Defendant Whitted, and in somewhat leading fashion, elicited testimony before the grand jury that Whitted had previously been convicted of drug trafficking which is a felony offense. As all parties acknowledge, Whitted does not have any prior convictions for drug trafficking, although he does have a prior conviction for drug possession (a misdemeanor) and conspiracy to commit murder.

This same grand jury testimony was previously presented by Defendant as the basis for a Motion to Quash the Indictment, (Doc. No. 33), which the Court denied in the Memorandum and Order dated July 21, 2006.

Defendant first asserts that this testimony violated the due process clause of the Fourteenth Amendment. The claim will be rejected because the Fourteenth Amendment protects individuals against improper actions by a state, which is not applicable in this case. Assuming that the Defendant intended to assert a violation of the due process clause of the Fifth Amendment, which does protect individuals from improper action by the federal government, the claim is denied for the same reasons set forth in the prior Order of July 21, 2006, dealing with the Defendant's efforts to dismiss the indictment.

Defendant further asserts that the prosecutor's conduct before the grand jury violated the Pennsylvania Rules of Professional Conduct, specifically Rules 4.1, 8.4(c) and 8.4(d). These rules pertain to fraudulent and misleading conduct by attorneys. Whitted alleges that government counsel intentionally elicited perjury from Agent Church in order to obtain an indictment against Whitted. However, the Court has previously found in the Memorandum dated July 21, 2006 that Whitted was not prejudiced by this testimony, given all the other evidence presented to the grand

jury, and furthermore, Whitted has no evidence that the government's error, whether it be the leading questions by the prosecutor or the answers by the witness, was intentional. Rule 4.1(a) states "in the course of representing a client, a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person. . . ." There is no evidence that the prosecutor knowingly made a false statement.

Rule 8.4(c) and (d) provide: "it is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice. . . ." Defendant does not cite any authority that holds a leading question of a witness, containing incorrect information concerning the prior criminal record of a subject of a grand jury investigation, constitutes ipso facto a violation of this rule. The Pennsylvania case law discussing this rule suggests much more egregious conduct. Office of Disciplinary Counsel v. Price, 732 A.2d 599 (Pa. 1999).

If the record were to show that Whitted had no prior convictions, but that the prosecutor secured testimony, particularly by leading questions, whereby the grand jury was advised of prior convictions that did not exist, Defendant would have a better argument of prejudice; however, it is doubtful that even that argument would call for disqualification of the entire United States Attorney's Office for the Eastern District of Pennsylvania. Defendant cites no authority warranting such drastic relief. Furthermore, the only purpose of disqualifying the entire office might be to allow Whitted to call the prosecutor who presented the case to the grand jury as a witness. However, the fact that incorrect testimony was presented to the grand jury would be of doubtful relevance to the trial of Whitted. In fact, the grand jury testimony would most likely only be admissible for impeachment, and there does not seem to be any reason why any party

would want to use the incorrect testimony about Whitted's criminal record for impeachment of any witness. If it were relevant, the Court presumes that the government would stipulate that the testimony given by the FBI agent was incorrect and this would obviate the need for disqualification of the trial prosecutor or his entire office.

The Court is unable to discern from any evidence of record that the prosecutor's question was an intentional effort to mislead the grand jury or represented dishonesty or false statements of material fact or any other conduct that is applicable. The admission of this testimony before the grand jury was not necessarily prejudicial as a prior conviction for drug trafficking is not an element of the offense, and furthermore, although the defendant did not have a prior conviction for drug trafficking, he does have another serious prior conviction. The defendant has failed to show any prejudice because the evidence before the grand jury relating to Whitted concerned his involvement in drug transactions, and the Court cannot ascertain that the prior conviction caused a return of this indictment, or more precisely, in the absence of this testimony, the grand jury would not have returned an indictment against Whitted.

II. Government's Motion to Admit Tape Recorded Conversations and Transcripts (Doc. No. 268)

The Court held a hearing on this Motion on October 24, 2006 at which the four Defendants named above were present with their counsel. The government played a number of recordings that were secured as part of the FBI investigation in this case, based on Title III Orders allowing telephone interceptions. FBI agent Luke Church testified as to the securing of the court orders, the identification of the telephones that were tapped, and the FBI methodology in listening to the subject telephone conversations and subsequent events including maintaining

custody of the tapes.

Following extensive testimony including cross examination by counsel, the Court finds that the government has established that the recording device used was capable of accurately recording the conversations, that the operator of the recording device was competent, that the tape recordings are authentic, that there have been no changes, additions to or deletions from the tape recordings, that the tape recordings have been properly preserved, that the speakers on the tape recordings are properly identified, and that the conversations were lawfully intercepted pursuant to applications made and orders issued under 18 U.S.C. § 2518. Copies of the applications and orders have been provided to the Defendants in accordance with 18 U.S.C. § 2518(9). Also, with respect to the consensual recordings, the consenting party to the recordings freely and voluntarily consented to the tape recordings of the conversations.

Agent Church established from his investigation that he had sufficient familiarity with the voices of the various witnesses whose voices the government asserts were intercepted on the tapes, except as to Arnold Montgomery. As expressed at the hearing, the Court is concerned whether agent Church's limited exchanges with Defendant Montgomery, at any time during the investigation, are sufficient to warrant the Court in finding at this time that Defendant Montgomery's voice is heard on the tape.

The Court held the hearing pursuant to the decision in United States v. Starks, 515 F.2d 112 (3d Cir. 1975), which held "that the burden is on the government to produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings." Id. at 121 (internal quotations omitted). The government contends that Rule 901, F. R. E., has supplanted Starks and now sets forth the appropriate test for showing authenticity of

evidence, and is a more general rule stating "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

The district court has considerable discretion in determining how to make the ruling on authentication and also in adjudicating the competing concerns and assuring that all the evidence submitted to the jury is authentic.

Pending receipt of a brief from Montgomery's counsel, the Court will withhold any ruling as to the admissibility of the tape recordings as to Defendant Montgomery. The government wishes to reopen the record as to Defendant Montgomery. The Court may not make a final ruling on this until the government has had an opportunity to present other evidence that Montgomery's voice is on the tape, whether pretrial or at trial. The government's motion will be granted as to the other Defendants.

An appropriate Order follows.

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ORDER

AND NOW, this 13th day of November, 2006, based on the foregoing Memorandum, it is hereby ORDERED as follows:

1. Motion by James Whitted to Disqualify the Eastern District of Pennsylvania United States Attorney's Office from Further Participation in Case Due to Ethical Breaches (Doc. No. 274 is DENIED.

2. The Government's Motion to Admit Tape Recorded Conversations and Transcripts (Doc. No. 268) is ADMITTED as to all Defendants except Arnold Montgomery, as to whom the Motion is held under advisement.

3. As to the Government's Second Motion to Hold Hearing Regarding Conflict of Interest and Status of Counsel (Re: Earl Raynor, Esquire, Counsel for Defendant Whitted), the Court will not disqualify Mr. Raynor from representing Mr. Whitted, but the Court will hold further proceedings on this issue at a hearing to be held on November 17, 2006.

4. The Government's Motion in Limine to Admit Statements of Defendant Proffer to the Government is held under advisement pending events at trial.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.